This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

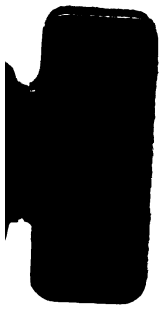
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 011 290 772

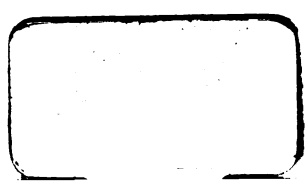
US 2618.58

Reinsch. English common law in the early American colonies. 1899

US 2618.58



HARVARD
COLLEGE
LIBRARY



ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES

BY

PAUL SAMUEL REINSCH, A. B., LL. B.

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY, UNIVERSITY OF WISCONSIN, 1898.

MADISON, WISCONSIN
OCTOBER, 1899

US 2618.58

HARVARD
COLLEGE
LIBRARY

ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES

BY

PAUL SAMUEL REINSCH, A. B., LL. B.

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY, UNIVERSITY OF WISCONSIN, 1898.

MADISON, WISCONSIN
OCTOBER, 1899

6371.1.5
U.S. 2618.58
HARVARD COLLEGE LIBRARY
DEC 26 1899
CAMBRIDGE, MASS.
The Univ. of Wisconsin

CONTENTS.

	PAGE.
INTRODUCTION	5
CHAPTER I.—New England	11
CHAPTER II.—The Middle Colonies	30
CHAPTER III.—The Southern Colonies	45
CHAPTER IV.—Conclusion	53
BIBLIOGRAPHY	60

THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES.

INTRODUCTION.

When American legal history comes to be studied more thoroughly, it will perhaps be found that no country presents, in the short space of three centuries, such a variety of interesting phenomena. An old nation, marked for a sturdy sense of right, sends colonies into a wilderness; they form rude institutions, often suggesting early European experience, to govern their simple social relations. As society grows more intricate, more highly organized, the legal institutions of the mother country are gradually received and applied, until a large portion of the common law is transferred to the actual practice of the colonies. Their law, however, always retains the impress of the earlier originality, when new conditions brought forth new institutions and new legal ideas. The struggles with the mother country tend to cause a wide spread of legal knowledge, and the common law is revered as a muniment of personal liberties. Blackstone is outdone by American lawyers in extravagant panegyrics. It is only when the rationalizing tendencies of French democracy become triumphant in America, that the value of the common law is openly and bitterly attacked. Then comes the great reforming and codifying movement of this century, in which New York is the leading state. Unconscious development of custom, reversal to simpler forms, adaptation and modification of a technical system brought from abroad, conscious reform, and, finally, the effort to cast all legal relations into a simple and lucid system,—all these phenomena can be traced

in our law, and nowhere can the interaction of popular consciousness of right with legal institutions be more fully and clearly ascertained.

The first question that confronts the investigator concerns the influence upon our system of the English common law, that complex body of principles and rules, contained, at the early colonial period, in the Year Books, Reports, and the standard law treatises of quasi-judicial authority. Statutory law-making had been but sparingly used up to this time in England, and the law of property and personal security, criminal law, and procedure, found their norms in a long series of judicial precedents. The transfer of this system to the colonies, its amalgamation with new forms there originated, its adaptation to novel conditions, constitutes a subject of rare interest.

The accepted legal theory of this transfer is well known. It is clearly stated by Story in Van Ness v. Packard, 2 Peters, 144: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their condition." This theory is universally adopted by our courts, and it has given them the important power of judging of the applicability of the principles of the common law to American conditions. According to this view, the common law was from the first looked upon by the colonists as a system of positive and subsidiary law, applying where not replaced by colonial enactments or by special custom suited to new conditions.

While this legal theory is adopted as an eminently satisfactory explanation of the jurisprudence of today, it is not complete enough to afford an adequate synthesis of colonial legal facts for the historian. It contains, of course, the great truth that men cannot all at once cut themselves loose from a system of thought or action under which they have lived; that, though they transfer themselves entirely to new conditions, their no-

tions and institutions must necessarily be circumstanced and colored by their former experience. Thus, of course, the more simple, popular, general parts of the English common law were from the first of great influence on colonial legal relations. This is, however, very far from declaring the common law of England a subsidiary system in actual force from the beginning of colonization. On the contrary, we find from the very first, originality in legal conceptions, departing widely from the most settled theories of the common law, and even a total denial of the subsidiary character of English jurisprudence. The first problem to be determined is therefore this: What was the attitude of the earliest colonists towards the common law as a subsidiary system? To the solution of this question this thesis addresses itself.

The earliest settlers in many of the colonies made bodies of law, which, from every indication, they considered a complete statement of the needful legal regulations. Their civilization being primitive, a brief code concerning crimes, torts, and the simplest contracts, in many ways like the dooms of the Anglo-Saxon kings, would be sufficient. Not only did these codes innovate upon, and depart from the models of common law, but, in matters not fixed by such codes, there was in the earliest times no reference to that system. They were left to the discretion of the magistrates.

In many cases the colonists expressed an adhesion to the common law, but, when we investigate the actual administration of justice, we find that usually it was of a rude, popular, summary kind, in which the refined distinctions, the artificial developments of the older system have no place. A technical system can, of course, be administered only with the aid of trained lawyers. And these were generally not found in the colonies during the 17th century, and even far down into the 18th we shall find that the legal administration was in the hands of laymen in many of the provinces. Only as the lawyers grow more numerous and receive a better training do we find a general re-

ception and use of the more refined theories of the common law. It is but natural, that with increased training the courts and practitioners should turn to the great reservoir of legal experience in their own language for guidance and information; the courts would be more ready to favor the theory of the adoption of the common law as it increased their importance, virtually giving them the power to legislate for the colonies. The foregoing statements are especially true of New England, where the subsidiary force of the common law was plainly denied; where a system of popular law (Volksrecht) grew up; and, where the law of God took the place of a secondary system.

In many instances we also note a clear reversion to an earlier type of law; the colonists again passing through the very experiences of their English fore-fathers in developing their legal institutions. As examples of this we might mention the union of powers in the councils; the petitioning against the exercise of extraordinary jurisdiction by the council in ordinary cases, which carries us back to the time of Edward III; archaic conceptions of the jury; the system of petty popular courts which had long become obsolete, or only maintained a precarious existence, in old England.

The legal theory of the transfer has its established place in American jurisprudence; but, historically, it should be modified so as to bring out the fact that we had a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law. In this way only shall we understand, from the first, the very characteristic and far-reaching departures from older legal ideas which are found in the New World; while, at the same time, its full importance is assigned to the influence of English jurisprudence in moulding our legal thought. The theory of the courts is an incomplete, one-sided statement needing historical modification. When the courts come to analyze the nature of the law actually brought over by the colonists they find it a method of reason-

ing,[1] "a system of legal logic, rather than a code of rules;" the rule, "live honestly, hurt nobody, and render to every man his due."[2] Such a very indefinite conception of the matter is without value historically; on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, of fixing really new and unprecedented rules and, by their adjudications, legislating in the fullest sense of the word. On the other hand, a historical study will reveal a most interesting organic growth, and, after the records have been more fully published, no system will offer more of interest to inquiring students than that developed on American soil. The study of the documents reveals great diversities in the early systems of colonial laws. Then with the growth of national feeling there comes also a growth of unification of legal principles, for which the English common law affords the ideal or criterion. And, though during the decade immediately preceding Independence, the English common law was generally praised and apparently most readily received by the larger part of American courts, still the marks of the old popular law remain strong and most of the original departures in American jurisprudence can be traced back to the earliest times.

The object of this thesis is to present the attitude of the colonists during the 17th century, and in some cases during the 18th, towards the common law of England. The manner of treatment will be by colonies; the purpose is to discuss first the colonies of New England in which the departure from common law ideas is most clearly marked, followed by the Middle and Southern colonies, many of which adhered more closely to the Old World model.

Neither does the scope of this thesis include, nor the extent of the hitherto published sources permit, a complete presentation of the varying systems of private law in use in the colo-

[1] Morgan vs. King, 30 Barbour, 13.
[2] Marks vs. Morris, 4 Hening and Mumford, 463.

nies. Very few of the colonial court records have been published; in some cases, as in Virginia after the Richmond fire of 1865, most of them are unhappily lost forever. A publication of characteristic records of this kind is a desideratum not only for legal history, but for the study of the general economic and social development. However, sufficient material is extant in accessible form to show the general attitude of the colonists and colonial courts towards the common law as a technical system, and it is this only on which the thesis hopes to throw some light.

CHAPTER I.

NEW ENGLAND.

Massachusetts.

The ideas of the Massachusetts colonists on the matter of law appear very clearly from a resolve of the general court[1] of the year 1636. The government is there entreated to make a draft of laws "agreeable to the word of God" to be the fundamental laws of the commonwealth. This draft is to be presented to the next general court. In the meantime, the magistrates are to proceed in the courts to determine all causes according to the laws then established (the early laws of the general court), and where there is no law "then as near the law of God as they can." The council is also empowered to make orders for the general conduct of business which is not yet covered by any law, and herein to apply its best discretion according to the rule of God's word. There is here absolutely no reference to the common law of England. As a subsidiary law the word of God is appealed to, as interpreted by the best discretion of the magistrates. This led to the administration of a rude equity, according to the idea of justice held by the magistrate, influenced by popular ideas and customs. With a homogeneous population holding the same general views on morals and polity, a true popular system of law could thus be produced, unrefined by juristic reasonings, untrammeled by technical precedents, satisfying, in general, the sense of right in the community. Should, however, alien elements intrude, they would find such a system exceedingly uncongenial and oppressive.

We find that in the early years of the colony the magistrates

[1] *Massachusetts Colonial Records*, I, 174.

and persons in authority were intensely reluctant to have any written laws made, because by these their discretion would be restrained. The reason assigned by Winthrop[2] for this reluctance was the desire to have laws grow up by custom, so as to have them adapted to the nature and disposition of the people, which could not be sufficiently known to the magistrates properly to legislate for them. A second reason was that the charter provided that the colonists should make no laws repugnant to the laws of England. This they held to refer to positive legislation. The growth of law by custom, though the product might be radically opposed to English principles, they believed no infringement of the charter. Notwithstanding these reasons of the magistrates, the general court insisted upon having a comprehensive body of laws made. The controversy had none of the acrimony of the similar struggle for written laws in Rome before the Twelve Tables; but we can note the same principles at work; the magistracy, in whose discretion the administration of the laws has so far been founded, are reluctant to give up a part of this power, and therefore resist a codification of law. The outcome of this agitation was the passage of the celebrated Body of Liberties,[3] in 1641. To evade one of the objections noted by the magistrates, this code was not really enacted as law, but the general court did "with one consent fully authorize and earnestly entreat all that are and shall be in authority to consider them as laws." The laws had been prepared by Nathaniel Ward, a minister with some legal training. They had been revised by the general court and sent into every town for further consideration. Upon the suggestions thus gathered they were again revised and then established as above mentioned. A more careful process of legislation is perhaps nowhere recorded. The laws may therefore be looked upon as a full expression of the popular sense of what the legal relations in the colony should be.

[2] John Winthrop's *History of New England*, 322.
[3] Winthrop's *Journal*, Ed. 1790, p. 237.

Ward, in a letter to Governor Winthrop,[4] December 22, 1639, questions the advisability of submitting the laws to the different towns for consideration by the freemen thereof, and fears that the spirits of the people might rise too high. They should not be denied their proper and lawful liberties, but he questions "whether it be of God to interest the inferior sort in that which should be reserved *'inter optimates penes quos est sancire leges.'*"

Turning now to the Body of Liberties itself, we find that the doctrine stated in 1636 is again announced, that no man's life shall be taken away unless by virtue of some express law established by the general court, or, in case of the defect of the law in any particular case, by the word of God.[5] This provision re-enacts the rule of the Massachusetts fundamentals.[6] "In all criminal offenses where the law hath prescribed no certain penalty, the judges have power to inflict penalties according to the rule of God's word."

The provisions of the Body of Liberties also show the theocratic nature of the Puritan colony. It contains, moreover, many provisions originated by the colonists in response to their special needs. The criminal law is founded on the code of Moses, though the breaking of the Sabbath and the striking of parents are not made capital offenses. In the laws of 1658, however, the latter offense, as well as rebellious conduct against parents is made capital.[7] The law of inheritance is taken from the Scriptures.

Imprisonment for debt, except when property is concealed, is not in use. Any debt due in bill or specialty may be assigned, and the assignee may sue upon the same. Cases involving an amount not over forty shillings are to be heard by magistrates or a commission of three freemen without a jury. A suit is commenced by summons or attachment. Testimony may be taken in writing by any magistrate or authorized commissioner

[4] *Massachusetts Historical Collections*, Series IV, vol. VII, 26.
[5] *Body of Liberties*, p. 1.
[6] Hutchinson, *State Papers*, 205.
[7] *Book of General Lawes and Liberties*, 1660, p. 8 and following.

to be used in criminal or civil cases. If the party cast has any new evidence or matter to plead he can obtain a new trial on bill of review. Free tenure of lands is adopted and all feudal incidents are abolished. Conveyances are to be by deed in writing. The period of prescription for title by possession is fixed at five years. Civil marriage is instituted.

The code of Ward was not the only one prepared for Massachusetts. John Cotton also submitted to the general court a body of laws, founded throughout on the Scriptures, with references thereto.[8] This code, though published in England and there reputed to be in force in the colony, was never enacted at all by the general court. The conception of law current among the Puritans is well illustrated by the remark of Cotton that he should not "call them laws because God alone has the power to make law, but conventions between men." This theory of law as the command of God, the mediæval conception uncolored by the modern views of sovereignty, seems to have been firmly held by the Puritans of New, as of Old, England.[9] The same view in addition to the reasons cited above may have prompted the general court not to call the Body of Liberties laws, but to pass them in the form of recommendations.

Turning now to the practice of magistrates and courts in the actual conduct of cases we shall find the same principles universally acknowledged. Everywhere, the divine law, interpreted by the best discretion of the magistrates, is looked upon as the binding subsidiary law; while the common law is at most referred to for the sake of illustration.

In 1641, the court had under consideration the case of the rape of a small child. There was a great question as to what kind of sin it was, and the court "sought to know the mind of God by the help of all the elders of the country." On the authority of Deuteronomy XVII, 12, it was held in another case that presumptuous sins were not capital unless committed in open

[8] *Hutchinson Papers*, vol. I, 160.
[9] Figgis, *Divine Right of Kings*, p. 223.

contempt of authority; and, in connection with this, Winthrop remarks that the "only reason that saved their lives was that the sin was not capital by any express law of God, nor was it made capital by any law of our own." In the same connection, Winthrop discusses the exaction of a confession from a delinquent in capital cases. It was decided that where one witness and strong presumption point at the offender, the judge might examine him strictly; but if there is only slight suspicion the judge is not to press him to answer.[10] After the trial in the Hingham matter [11] the Deputy Governor stated in a public speech: "The great questions that have troubled the country are about the authority of the magistrates and the liberty of the people. The covenant between you and us is that we shall judge you and your causes by the rules of God's law and our own."

On the trial of Mr. Hubbard[12] the court told the prisoner that he was to be tried by the law of God, which the magistrates were to judge by in case of the defect of the express law. Hubbard complained that the law of God admitted of various interpretations, and after being fined and bound to his good behavior he asked to know what good behavior was. The jury in this case found him guilty of uttering diverse speeches "tending to sedition and contempt of said government and contrary to the law of God and the peace and welfare of the country."[13] The form of punishment was largely in the discretion of the magistrates.[14] Although the English names of actions were used, the practice was exceedingly lax, and the action on the case was constantly used for the recovery of land; thus disregarding the fundamental distinction between real and personal property and real and personal actions in the English law.[15] The distinctions between common law and admiralty procedure were totally disregarded.[16]

[10] Winthrop's *History of New England*, II, 56, 250.
[11] Ibid., II, 221, 228.
[12] Ibid., 255.
[13] *Massachusetts Historical Society Collections*, II, vol. IV, 110.
[14] Lewis, *History of Lynn*, pp. 73, 81.
[15] Washburn, *Judicial History of Massachusetts*, p. 61.
[16] Case of Lady Latour vs. Bailey, Winthrop's *History of New England*, II, 192.

In the *Hutchinson Papers* [17] there is preserved a very interesting account of a case before Symonds, magistrate. To judge from his letters, Symonds was a careful student and great admirer of the English common law.[18] The case under consideration, Giddings vs. Brown, brought up some very interesting questions as to the nature of law and the power of the courts. A dwelling had been voted by a town to its minister; the plaintiff had resisted the collection of the tax that had been levied to pay for this dwelling, and his goods were accordingly distrained. Symonds, in giving judgment for the plaintiff, says that "the fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a fundamental right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law is therefore void, and the taking was not justifiable." Symonds refers with respect to the English law and quotes Finch and Dalton. He uses it, however, merely for illustration, and says "let us not despise the rules of the learned in the laws of England who have every experience." The precedents on which he relies are colonial, their binding force is recognized. The substance of the judgment is that property cannot be taken by public vote for private use. The opinion is interesting as an expression of natural law philosophy, and it is, perhaps, the earliest American instance where the power is claimed for the courts to control legislative action when opposed to fundamental law.[19] The case, moreover, shows very clearly in what light the common law was regarded by the New England colonists; not at all binding *per se,* but in as far as expressive of the law of God to be used for purposes of illustration and guidance.

Popular courts of jurisdiction in petty cases, which had long fallen into disuse in England, were established in most of the

[17] *Hutchinson Papers,* Vol. II, p. 1.

[18] Letters of Symonds to Gov. Winthrop, *Massachusetts Historical Society Collections,* IV, vol. VII, pp. 124, 132.

[19] *Cf. Coke's opinion in Bonham's Case,* 8 *Rep.,* 118*a*.

colonies. In Massachusetts inferior courts consisting of five judges, one of whom was an assistant, and having jurisdiction in lesser civil and criminal cases, were early established.[20] Petty civil cases in the towns were tried by courts of one judge, or commissions of three freemen.[21] A system of appeals was instituted, ascending from the town court to the inferior or county court, thence to the assistants, thence to the general court. Appeal to England was not allowed and claims for it were always strenuously resisted.

The pleadings in these courts were very concise and informal, and there was little regard paid to forms of action.[22] Up to 1647, the pleadings seem to have been oral. By a law of that date[23] it was enacted that the declaration should be drawn up in writing and should be filed with the clerk of the court three days before the term.

Contrary to the English custom, a record of evidence given in the courts seems to have been kept from the earliest times. In 1650, it was enacted[24] that on account of the inconvenience of taking verbal testimony in court, the clerk not being able to make a perfect record thereof and prevent all mistakes, the evidence should be presented in writing to the court, either attested before a magistrate or in court upon oath. This provision, thoroughly at variance with the common law, excited the adverse comment of professional lawyers.[25]

Coming now to the trial by jury, we find that this ancient and popular institution was in early use in Massachusetts, a jury having been empanelled a few months after Winthrop's arrival.[26] The system was, however, by no means unquestionably accepted, and seems to have had a very insecure tenure for a time. In 1642, a commission was appointed to consider

[20] *Massachusetts Colonial Records*, I, 169.
[21] Ibid., 239.
[22] Washburn, *Judicial History*, 48.
[23] *Massachusetts Colonial Records*, II, 219.
[24] Ibid., II, 211.
[25] *Documents Relative to the Colonial History of New York*, IV, 929.
[26] *Massachusetts Colonial Records*, I, 77–78.

whether to retain or dismiss juries in the trial of causes;[27] and it appears that juries were for a time abolished, for, in 1652, we find the following resolve "the law about juries is repealed and juries are in force again."[28]

The mode of trial exhibits many interesting peculiarities. The province of judge and jury is quite correctly defined in an act of 1642, where the finding of matters of fact by the jury, instructions in law by the court, and the decision of matters of equity by the latter is provided for.[29] In 1657, the jury was permitted to present a special verdict.[30] But it seems that for a time the magistrates acquired a very considerable power of controlling the jury. Hutchinson says: "The jury sometimes gave their verdict, that there were strong grounds of suspicion, but not sufficient for conviction. Upon such a verdict the court would give sentence for such offenses as the evidence at the trial might have disclosed." He adds in a note the advice of Lieut. Gov. Stoughton to Governor Hinckly of Plymouth, given in 1681: "The testimony you mention against the prisoner I think is sufficient to convict him; but, in case your jury be not of that mind, if you hold yourself strictly obliged by the laws of England, no other verdict but 'not guilty' can be brought in; but, according to our practice in this jurisdiction, we should punish him with some grievous punishment according to the demerit of his crime, though not found capital."[31]

In 1672, an attempt was made to limit the power of the magistrates in this respect.[32] For the controlling authority of the magistrates there is offered as a substitute the archaic method of attainting the jury for giving a verdict contrary to the weight of evidence; and the law allowing the magistrates to refuse the verdict of the jury is repealed. This is a remarkable instance

[27] *Massachusetts Colonial Records*, II, 28.
[28] Ibid., IV, 107.
[29] Ibid., II, 21.
[30] Ibid., III, 425.
[31] *Massachusetts Historical Society Collections*, Series II, Vol. I, p. XXII.
[32] *Massachusetts Colonial Records*, IV, part 2, p. 508.

of reversion to an archaic method. The jury in such a case was to be tried by a new jury of twenty-four, and the court had no control over the verdict. It seems that many juries were attainted, because in 1684 it was enacted[33] on account of the unreasonable trouble caused by numerous attaints, that the cause of attaint shall be given in writing; that if the verdict is confirmed, the person attainting shall be fined 34 pounds; and that the jury may also prosecute him for slander, with other additional penalties. The jury were also at liberty, when they were not clear in their conscience about any case, "in open court to advise with any man they should think fit, to resolve and direct them before they gave their verdict."[34]

In the colonial system of Massachusetts we find traces of the common law; the less technical parts of its terminology are in use, forms of contracts and deeds are modeled on English precedents, although for the latter acknowledgment and recording is essential to validity.[35] But the authority of the common law as a subsidiary system is nowhere admitted, its principles are radically departed from and its rules used only for purposes of illustration.

The magistrates administered a rude system of popular law and equity, on the basis of the Scriptures and their own ideas of right, generally to the satisfaction of the homogeneous Puritan communities; though there are some struggles recorded, such as that for written laws and for the control of the juries. Capt. Bredon writes to the Council of Colonies, speaking of the printed laws of Massachusetts: "What laws are not mentioned in this book are in the magistrates' breasts to be understood."[36] The elements dissatisfied with this regime generally left for Rhode Island, the Connecticut river settlements, Maine or New Hampshire, where society was less autocratic; but still we find a num-

[33] *Massachusetts Colonial Records*, V, 449.
[34] *Colonial Laws of Massachusetts Bay*, Ed. 1660, pp. 47, 48.
[35] *Massachusetts Colonial Records*, I, 116; and *Suffolk County Deeds*.
[36] *Documents Relative to the Colonial History of New York*, III, 39.

ber of protests recorded against the manner of administering the law by persons remaining in the colony.

The complaint that no one could have justice but members of the church[37] is very common on the part of outsiders. In 1646, there was a very important controversy, in which a party of men led by Robert Child demanded the establishment of English law. In their remonstrances[38] they say that they cannot discern a settled form of government according to the laws of England; nor do they perceive any laws so established as to give security of life, liberty, or estate. They object to discretionary judgments as opposed to the unbowed rule of law, and petition for the establishment of the wholesome laws of England, which are the result of long experience and are best agreeable to English tempers; that there should be a settled rule of adjudicature from which the magistrates cannot swerve. Those laws of England, they say, are now by some termed foreign, and the colony termed a free state.

In the answer by the general court[39] the petitioners are held up to ridicule for their own ignorance of what English laws they really wanted. It is then asserted that the laws of England are binding only on those who live in the English country, for neither do the laws of Parliament nor the King's writ go any farther. "The laws of the colony," they say in substance, "are not diametrically opposed to the laws of England, for then they must be contrary to the laws of God, on which the common law, so far as it is law, is also founded. Anything that is otherwise established is not law but an error, as it cannot be according to the intent of the law-makers to establish injustice." This is the true Puritan idea of law as the command of God; the general court asserts that the common law, so far as it is law, must embody divine justice. For their part the Puritans prefer to go to the original source of law, the Scriptures.

[37] *Massachusetts Historical Society Collections*, Series IV, vol. VII, p. 370.
[38] *Hutchinson Papers*, Prince Society, I, 189.
[39] Winthrop, *History of New England*, II, star p. 284.

In connection with this matter the general court also made a declaration which was evidently intended for the general public and the home government.[40] They there assert that the government is framed according to the charter and the fundamental and common laws of England. They add in brackets, "taking the words of eternal righteousness and truth with them as the rule by which all kingdoms and jurisdictions must render account." Then they make a comparison between the fundamental and common laws of England and the laws of the colony, taking Magna Charta as the embodiment of English common law; and they state that, as the positive laws of England are constantly being varied to answer different conditions, they should consider it right to change and vary their legislation according to circumstances. They confess an insufficient knowledge of the laws of England, and say, "If we had able lawyers amongst us we might have been more exact." Their comparison of the laws shows the rudimentary character of their knowledge. Finding some discretion allowed English judges in criminal cases they take this as a precedent for the Massachusetts method of inflicting penalties according to the rule of God's word. They conclude by instancing the extraordinary jurisdictions in England, the chancery, the court of requests, the admiralty and ecclesiastical courts, and say that experience shows that Englishmen may live comfortably and securely under some other laws than the common and statutory laws of England.

The methods of Massachusetts colonial justice are described by Letchford in his book, *Plaine Dealing*. He was a lawyer who had been employed in doing minor editorial work on the *Body of Liberties*. Owing to the prejudice against lawyers, general in the colonies but especially strong here, he was not permitted to practise his profession, and therefore was perhaps an unreasonably severe critic of the system under which he suffered. As his views are, however, corroborated by the statements of other witnesses, their truth so far as the proceedings

[40] *Hutchinson Papers*, 1, 197.

of the courts are concerned may perhaps be accepted. He says among other things[41] that the governor in charging the grand jury uses the heads of the ten commandments. That in jury trials matters of law and fact are not distinguished.[42] The records of the courts are not kept in due form of law, in most cases the verdict only being entered. Hence the disposition to slight all former laws and precedents, "but go hammer out new upon the pretense that the word of God is sufficient to rule us." He advises his brethren to "despise not learning nor the learned lawyers of either gown."

In his narrative to the council[43] Edward Randolph states that "the laws and ordinances of Massachusetts are no longer observed than they stand in their convenience; and in all cases, regarding more the quality and affections of the persons to their government than the nature of their offense." He states that it was regarded as a breach of the privilege of the colony to urge the observation of the laws of England, and notes some of the provisions repugnant to the common law, such as obtaining prescriptive title to land by possession for five years, and the use of the word of God as a rule in criminal cases. In another report in 1678 he states that the laws of England are neither in the whole nor in any part of them valid or pleadable in the colonial courts until received by the General Assembly.[44]

The colony always resisted claims of a right of appeal to England; this was one of the most important points of controversy between the colonial court and the home government after 1660. In that year the colonists instructed Captain John Leveritt as their agent in England to resist any claims or assertions of appellate jurisdiction, because that would render government and authority in the colony ineffectual and bring the court into contempt with all sorts of people.

In 1677, the Privy council made specific objection to the

[41] *Plaine Dealing*, Trumbull's edition, p. 26.
[42] Ibid., p. 27.
[43] *Hutchinson Papers*, II, p. 210.
[44] *Edward Randolph, Prince Society Publications*, II, 311.

laws of Massachusetts repugnant to the laws of England. The Attorney General submitted a catalogue of such laws.[45] In answer to these objections the general court made several amendments in 1681;[46] the law concerning rebellious sons, concerning Quakers, and the law against keeping Christmas were left out; but no alteration was made in the law of marriage and Sunday legislation. In connection with this controversy the general court again asserted the independence of the colony from English laws.[47] They speak of the laws of England as bounded within four seas and not reaching to America. The American subjects not being represented in Parliament should not be impeded in their trade by Parliament. Before this time legal proceedings had been carried on in the name of the colony. One of the results of the controversy was that the general court yielded in this respect, and process was hereafter issued in the name of the king.

After the charter had been annulled, there followed a strong and continued effort to introduce the common law. By the commission of Sir Edmund Andros, in 1688 the governor and council were appointed a court of record to try civil and criminal cases, their proceedings and judgment to be consonant and agreeable to the laws and statutes of England.[48] The arbitrary government of Andros, however, did perhaps more to introduce a knowledge of the common law, than this provision, because against his despotic rule the colonists now began to assert rights protected by the English law, such as the right of Habeas Corpus. Thus when we hereafter find expressions of admiration for or adherence to the common law, such as are very common in the succeeding century and especially at the beginning of the Revolutionary War, they refer rather to the general principles of personal liberty than to the vast body of rules regulating the

[45] Palfrey, quoting from Phillip's collection of manuscripts, *History of New England*, III, 309.
[46] *Massachusetts Colonial Records*, V, 321.
[47] Ibid., V, 198 200.
[48] *Documents Relative to Colonial History of New York*, III, 539.

Batty Aspinwall 3089

rights of contract and property and the ordinary proceedings in court.

By the charter of 1692, the appointment of judges and justices of the peace was given to the governor and the council. Their tenure was practically during good behavior;[49] but though the direct popular nature of the courts was thus destroyed, it was a considerable time before trained jurists came to control the administration of law in Massachusetts.

Chief Justice Attwood visited Boston in 1700, and in his report to the Lords of Trade[50] he states that he had "publicly exposed the argument of one of the Boston clergy, that they were not bound in conscience to obey the laws of England." He complains of various insults offered him while sitting as judge in the admiralty court. He attended the session of the Superior court at Boston, and there observed that their "methods were abhorrent from the laws of England and all other nations." He especially notes the ease with which new trials are obtained and the fact that evidence is offered in writing, which is a temptation to perjury, new proofs being admitted at the later trials. This criticism shows that there was no sudden breach in the development of Massachusetts law, and that at the beginning of the 18th century the old popular law was still largely administered in derogation of the more highly developed rules of the common law. It is stated that after the change in the appointment of judges, practice became very captious and sharp. In 1712, the first professional lawyer, Lynde, became Chief Justice, and after this we find that English books and authors are frequently cited.[51] But the early character of Massachusetts law has never ceased profoundly to influence the system of that state, the originality of whose jurisprudence has always been recognized. Jefferson says in a letter to Attorney General Rodney, September 25, 1810,[52] speaking of Lincoln, of Massa-

[49] Washburn, *Judicial History*, p. 138.

[50] *Documents Relative to Colonial History of New York*, IV, 929.

[51] Arguments of Valentine, in Matson vs. Thomas, 1720, citing Coke and Hobart.

[52] Jefferson's *Complete Works*, V, 546.

chusetts, as a possible successor to Cushing as Chief Justice: "He is thought not to be an able common lawyer, but there is not and never was an able one in the New England states. Their system is *sui generis* in which the common law is little attended to. Lincoln is one of the ablest in their system." How strongly the old view of law which we have noticed maintained itself in Massachusetts, we see from John Adams' statement in the Novanglus:[53] "How then do we New Englanders derive our laws. I say not from Parliament, not from the common law, but from the law of nature and the compact made with the king in our charter. Our ancestors were entitled to the common law of England when they emigrated; that is to say, to as much of it as they pleased to adopt and no more. They were not bound or obliged to submit to it unless they chose."

In Massachusetts, during the 17th century we find a continued, conscious, and determined departure from the lines of the common law. It is not accepted as a binding subsidiary system, the law of God there taking its place. Indeed, it colored and influenced the legal notions of the colonists, but they always resisted the assertion of its binding force. The absence of lawyers made the administration of a highly developed system impossible. We have a layman law, a popular, equitable system which lacks the elements of rigor, of clear cut principles, of unswerving application, but which forms a basis on which with the advent of legal training a strong original system could be reared.

Connecticut and New Haven.

In Connecticut and New Haven we find a development similar to that of Massachusetts. The Connecticut code of 1642 was copied from that of Massachusetts.[54] The fundamental order of New Haven[55] provides for the popular election of the

[53] 1774, John Adams, *Works*, IV, 122.
[54] *Connecticut Records*, I, 77.
[55] *New Haven Records*, I, 73.

magistrates, and for the punishment of criminals "according to the mind of God revealed in his word." The general court is also to proceed according to the Scriptures, the rule of all righteous laws and sentences. In the fundamental agreement[56] all freemen assent that the Scriptures hold forth a perfect rule for the direction and government of all men in all duties. The Scriptural laws of inheritance, dividing allotments, and all things of like nature are adopted, thus very clearly founding the entire system of civil and criminal law on the word of God. This principle is re-enacted in similar language in 1644.[57]

In Connecticut the trial by jury was put into practice from the first, the use of the grand jury coming in somewhat later.[58] It is, however, provided that upon continued failure to agree, a majority of the jury could decide the issue, and in case of equal division, the magistrate had a casting vote.[59] In New Haven the institution of jury trial was not at first adopted.[60] It is stated that this was so settled upon some reasons urged by Mr. Eaton.

As already indicated, the system of popular courts was adopted in both colonies. In 1699, the practice of commissioning justices for stated periods was tried, but it was continued for only three years.[61] The judges of these courts exercised a broad discretion. That Connecticut was independent of the home country in legal matters is noted by Quary in his report to the Lords of Trade in 1707.[62] If possible, these colonies departed even further from the common law than Massachusetts in their system of popular courts, absence or radical modification of the jury trial, discretion of the magistrates, and, in the case of New Haven, the clear and unequivocal assertion of the binding force of divine law as a common law in all temporal matters, as a guiding rule in civil and criminal jurisdictions.

[56] *New Haven Records*, I, 1.
[57] Ibid., I, 130.
[58] *Connecticut Records*, I, 9, 91.
[59] Ibid., 84.
[60] *Massachusetts Historical Society Collections*, series II, vol. VI, 320.
[61] Ibid., series VI, vol. III, 44.
[62] *Documents Relative to Colonial History of New York*, V, 31.

New Hampshire.

The settlers of New Hampshire and Vermont were in many cases malcontents who had left the Puritan colonies. They were not so homogeneous a society, and therefore the assertion of the binding force of the common law could be more successfully made. The commission of 1680 orders proceedings in the courts to be consonant to the laws and statutes of England, regard, however, being had to the condition of the colonists.[63] The General Assembly, meeting at Portsmouth in March, 1679–80, passed a body of general laws in which they claimed the liberties belonging to free Englishmen. They, however, refused to admit the binding force of any code, imposition, law, or ordinance not made by the General Assembly and approved by the president and council. The code itself is very simple, but in place of biblical references English statutes are cited.[64] As a matter of fact it may be questioned whether this submission to English law, if any there was, was more than formal. The general court petitioned against appeals to England in 1680.[65] The settlers were so impatient of control that all questions of law and fact were decided by juries. The judges had a term of one year only and none of the influence of the Massachusetts magistrates.[66] Under this regime, the administration of the rules of the common law would of course be impossible. The early judges and chief justices were all business men, seamen, or farmers; only in 1726 did a man of liberal education, Judge Jaffray, graduate of Harvard in 1702, appear on the bench.[67] And it was only in 1754 that a lawyer, Theodore Atkinson, also a graduate of Harvard, became chief justice. Samuel Livermore, chief justice in 1782, though trained in the law, refused to be bound by precedents, holding, "that every

[63] Poore, *Constitutions, Charters and Documents*, p. 1276.
[64] Belknap's *New Hampshire*, p. 454; *New Hampshire Documents and Records*, I, 382.
[65] Cited in Belknap's *New Hampshire*, p. 457.
[66] Danl. Chipman, *Vermont Reports*, pp. 11, 19, 21.
[67] C. H. Bell, *Bench and Bar of New Hampshire*, 13.

tub should stand on its own bottom;" and looking upon the adjudications of English tribunals only as illustrations.[68] It may be said that no real jurist, no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power in New Hampshire during the entire 18th century.

Rhode Island.

This colony was consciously founded on a democratic basis.[69] The charter is made the basis of government, by which legislative action is to be restricted. In order to escape the imputation of anarchy, and to preserve every man safe in his person and estate, the common law is to be taken as a model for legislation in as far as the nature and constitution of the place will permit. The code itself shows a very archaic conception of law. In its classification it especially reminds us of the Anglo-Saxon dooms in the prominence it accords to crimes and torts. It classifies law under five general heads: (1) murthering fathers and mothers; (2) man slayers; (3) sexual immoralities; (4) men-stealers; (5) liars, under which heading are comprised perjury, breach of covenant, slander, and other torts. On the other hand, however, it contains some provisions of an advanced nature. Murder and man-slaughter are distinguished on the principle of malice aforethought. Theft committed by a child or for hunger is declared to be only petty larceny. Promises and contracts, especially for large amounts, are to be drawn up in writing. The conveyance of land must be made in this form. This provision by many years antedates the celebrated Statute of Frauds of English law. Imprisonment of debtors is forbidden; "none shall lie languishing for no man's advantage." Lands are made liable to execution. In general, the statement of the code is concise and clear; English statutes are frequently cited, but in spirit the code is thoroughly origi-

[68] Bell, *Bench and Bar*, p. 37.

[69] Code of Civil and Criminal Law of 1647; cited in full in Arnold's *History of Rhode Island*, I, 205, et seq.; *Rhode Island Colonial Records*, 1, 156.

nal though in parts archaic. That it was considered a sufficient statement of law is shown by the enactment that "In all other matters not forbidden by the code all men may walk as their conscience persuades them." A modified form of jury trial is instituted by a later enactment.[70] The province of judge and jury is there defined. As in Massachusetts attaint is made a remedy for a false verdict.

Bellomont sent the laws of Rhode Island to the Council in 1699, [71] when he gives it as his opinion that the world never saw such a parcel of fustian. He also says: "Their proceedings are very unmethodical, no wise agreeable to the course and practice of the courts of England, and many times very arbitrary and contrary to the laws of the place; as is affirmed by the attorneys at law that have sometimes practiced in their courts." * * * "They give no directions to the jury nor sum up the evidences to them, pointing out the issue which they are to try." Later, however, in 1708, Governor Cranston writes to the Lords of Trade: "The laws of England are approved of and pleaded to all intents and purposes, without it be in particular acts for the prudential affairs of the colony."[72]

Up to the time of the Revolution, judges were elected annually from the people. The Newport court records show us the extent of the discretion of magistrates. In an action for debt the court, considering the defendant's poverty, ordered him to work for the plaintiff at carpentry until the debt were extinguished. Meanwhile other creditors were forbidden to sue him. Even after a verdict of not guilty, the court often imposed costs or ordered the accused to leave the colony. [73] The attitude of Rhode Island towards lawyers is shown by the fact that by an act of the general assembly in 1729 they were forbidden to be deputies, their presence being found to be of ill consequence.[74]

[70] *Rhode Island Colonial Records*, I, 198.
[71] *Documents Relative to Colonial History of New York*, IV, 600.
[72] Durfee, *Gleanings from the Judicial History of Rhode Island*, p. 78.
[73] Ibid., p. 127–137.
[74] Arnold's *History of Rhode Island*, II, 98.

CHAPTER II.

THE MIDDLE COLONIES.

New York.

In this colony the common law received early recognition and an approach was made to complete and intelligent enforcement. The population of New York was exceedingly heterogeneous; the original Dutch settlers, the early English settlers of various character from the different colonies and the mother country. The close knit social relations found in Massachusetts and Connecticut are here absent, and popular law cannot therefore be so readily developed. There is a demand for a system of common law by which the relations and interests of these various elements may be regulated. The colony being under royal authority almost from the beginning, its rulers soon accustomed it to the principles of the English common law. Thus when the growing feeling of unity and nationalism called for a unification and harmonizing of American law, New York state, which had most successfully adapted the common law to American conditions, became the leader in juristic development. Its judges, like Kent, became the authoritative expounders of the American form of the common law. But, on the other hand, many of the original American ideas in jurisprudence, such as the reform of the law of real property and the law of pleading, which we find in germ in the early history of the other colonies, were carried to completion and given their lasting form in the state of New York, whose jurists had profited from a longer training in a regular system of jurisprudence.

We must, however, by no means conclude that the common law was administered in New York from the very beginning of

English occupation as a complete subsidiary system. The feeling that for a new colony a new body of laws is necessary led to the compilation of what is known as the Duke of York's laws, which were promulgated at an informal assembly at Hampstead in 1665.[1] The first New York legislature met in 1683, and, among other acts, passed bills regulating the judicial proceedings, and for preventing perjuries and frauds.[2] Governor Nichols, before courts had been created, took upon himself the decision of controversies and pronounced judgment after a summary hearing.[3] In writing to Clarendon, July 30, 1665, he says: "The very name of the Duke's power has drawn well-affected men hither from other colonies, hearing that the new laws are not contrived so democratically as the rest."[4] At this time laws are confirmed, reviewed, and amended by the general assizes composed of the governor, the general council and the judges upon the bench. A year later, April 7, 1666, Nichols writes to Clarendon[5] remitting a copy of the laws collected from the laws of the other colonies with such alterations as would tend to revive the memory of old England; he says that "the very name of Justice of the Peace is held an abomination, so strong a hold has Democracy taken in these parts." He complains of the refractory disposition of the people, and describes his efforts to introduce English statutes and authority. It is apparent from this correspondence that it was considered necessary to restate the law in a codified form for the use of the colonists; and an informal transfer of the common law in its original "unwritten" character was evidently not considered sufficient or suitable to the circumstances by the men in authority.

Governor Dongan in his report to the Committee on Trade,[6] February 22, 1687, gives a list of the courts of justice established at that time: (1) a court of chancery composed of the governor

[1] *Documents Relative to Colonial History of New York*, III, 260, 416; IV, 1154.
[2] Ibid., III, 355.
[3] Smith's *History of New York*, 55.
[4] *New York Historical Society Collections*, 1869, 75.
[5] Ibid., p. 118, 119.
[6] *Documentary History of New York*, I, 147.

and council, which is the supreme court of appeals; (2) the courts of oyer and terminer held yearly in each county; (3) the court of the mayor and aldermen in New York; (4) the courts of session (justices of the peace); (5) court commissioners for petty cases; (6) a court of adjudicature, a special court established to hear land cases. These courts had none of the popular elements which we have noted in the Puritan colonies. Governor Dongan also states that the laws in force were the laws of the Duke of York and the acts of the general assembly, not mentioning the common law in this connection. In a similar report, Governor Nichols[7] states that "all causes are tried by juries, and that there are no laws contrary to the laws of England," while he ascribes full law-making power to the court of assizes (1669). Governor Andros reports that, "He keeps good correspondence with his neighbors as to civil, legal and judicial proceedings." Bellomont, in 1699, sending a copy of the printed laws to the council, asks for a careful perusal and criticism of them by some able lawyer in England; which would indicate the absence of trained jurists in the colony at that time.[8] In a report on the methods of proceedings in court, William Smith writes to Bellomont in 1700:[9] "The rules and methods we are governed by in all trials is the common law of England, and the several statutes declarative thereof according to the manner and methods of the courts at Westminster." In the earlier days of the colony, confused notions of law and equity seem to have prevailed; and in a number of reported cases tried on Long Island after verdict of the jury there was an appeal to equity, most generally successful. No settled rules were here regarded, but a discretion similar to that of the New England magistrates was exercised.[10] In one of these cases the judgment is said to be given according to law and good conscience.[11]

[7] *Documentary History of New York*, I, 87.
[8] *Documents Relative to Colonial History of New York*, IV, 520.
[9] Ibid., VIII. 28.
[10] *Documents Relative to Colonial History of New York*, XIV, 570, 589, 600, 629.
[11] Underhill vs. Hempstead, Ibid., 589.

Immediately upon the occupation by the English, the jury came into use in New York. Jury trials are, however, at first, very informal, more after the manner of a simple arbitration, and verdicts are often given in the alternative.[12]

In the form of testamentary disposition the Roman Dutch law of the New Netherlands left abiding traces. The method of making wills by oral declaration before a notary, or by a written and sealed instrument deposited with that official, was used long after the first English occupation.[13]

We find that in these early days the functions of the court were not only judicial but administrative, much like those of the earliest itinerant judges in England. Thus the judges are directed to make inquiries into town training, the bearing of arms, the price of corn, wages, and escheats.[14] As another reversion to older practice, we may note the concentration of various functions, judicial, administrative, and legislative, in the hands of the colonial council of the earliest time. A still closer analogy to mediæval English history in this respect we shall find in the case of Pennsylvania.

In the year 1700, a professional English lawyer, Attwood, became chief justice of New York. It was his avowed purpose to introduce the common law and practice of the English courts into the colony. He was, however, too assertative, and favored strong government too much, so that he in some cases perverted the law to his own uses, as when he declared that whatever was treason before 25 Edward III was still treason at common law;[15] or when he held that a grand jury was only an inquest of office and that eleven could indict.[16] He complained in a letter to the Lords of Trade[17] that "several here cannot well bear with the execution of the laws of England." His methods soon led to his unpopularity and his final disgrace.

[12] Fernow, *Records of New Amsterdam*, V, 267ff.
[13] Fernow, *Calendar of Wills*, p. IV.
[14] *Documents Relative to Colonial History of New York*, XIV, 637.
[15] Ibid., IV, 974.
[16] Ibid., 1010.
[17] Ibid., 923.

As in other colonies, lawyers were unpopular in the early days of New York. "The general cry of the people both in town and country was, 'No lawyer in the Assembly!'"[18] As we have seen, the early governors exercised what was called an equity jurisdiction, but no regular court of equity was established. In 1711, Governor Hunter addressed the Lords of Trade in this matter. He speaks of the necessity of giving equitable relief in many cases, and instances the case of a merchant, who inadvertently confessed judgment for 4,000 pounds, the real debt being 400 pounds, and who then languished in prison. He says that the House declared that the trust of the seal constitutes him the Chancellor, but having already too much business and being ignorant in law matters he asks the Lords of Trade for advice.[19] They simply answer[20] that he is authorized to establish, with the consent of the council, any court that may be necessary. A court of chancery was accordingly established, but in 1727 the assembly resolved that the creation of this court without its consent was illegal. Its fees were reduced and its jurisdiction languished for a time.[21] Colden ascribes these resolves to the vindictive intrigues of the speaker, who had been defeated in a chancery suit.[22]

The complete doctrine of the binding force of the common law in New York was not stated before 1761, but a most thoroughgoing statement is found in Governor Tryon's report,[23] where he declares that "the common law of England is the fundamental law of the province, and it is a received doctrine that all the statutes enacted before the province had a legislature are binding upon the colony;" also that in the court of chancery the English practice is followed. Some years before, in 1762, Chief Justice Pratt, in a memorial to the Lords of Trade,

[18] Gov. Colden to Hillsboro; *Documents Relative to Colonial History of New York*, VIII, 61.
[19] *Documents Relative to Colonial History of New York*, V, 208.
[20] Ibid., 252.
[21] Smith's *History of New York*, 270.
[22] *New York Historical Society Collections*, XVIII, 211.
[23] 1774; *Documentary History of New York*, I, 752.

complains of the insufficient influence of the judiciary. He says that "All the colonies being vested with legislative power, their systems of laws are gradually varying from the common law. If the judgments of the supreme courts are only vague and desultory decisions of ignorant judges the mischief is augmented, and a more influential and better paid judiciary is called for."

New Jersey.

The two parts of New Jersey, East and West Jersey, had a different social complexion, and we may therefore look for divergent views on the subject of law. West Jersey was a pure Quaker commonwealth, where the influence of Penn was very strong; while in East Jersey conditions similar to those in New York prevailed. We find, however, in both parts of New Jersey a system of popular courts. In East Jersey[24] the court system was established by the legislature in 1675. A monthly court for the trial of small causes was held in each town of the province by two or three persons chosen by the people. County courts were held twice yearly in each county; from these there was an appeal to the court of chancery. Proceedings in these courts were of the utmost simplicity. It was provided that any person might plead for himself; that no money was to be taken for pleading or advice.[25] In West Jersey a similar system of courts prevailed; justices of the peace, county courts, and a supreme court of appeals; the latter was instituted in 1693 and a final appeal from it to the general assembly was authorized in 1699. The term, court of chancery, is not used in West Jersey. The power of the jury was exaggerated, the three judges having no authority to control the verdict of the twelve men "in whom only the judgment resides." In case the judges should refuse to pronounce judgment, any one of the twelve by consent of the rest may do so.[26] Capital punishment was not

[24] *Grants and Concessions*, p. 96.
[25] Ibid., p. 128.
[26] Ibid., p. 396.

fixed by the law. It was enacted[27] that "All persons guilty of murder or treason shall be sentenced by the general assembly, as they in the wisdom of the Lord shall judge meet and expedient." This would indicate a view of law similar to that held by the colonists of Massachusetts and New Haven.

The early laws of East Jersey were founded largely on scriptural authority.[28] Thus the law of trespasses and injuries by cattle, of injury by fire, of negligence, and the criminal law, are in agreement with the laws of the Exodus. In 1675 imprisonment for debt was prohibited except in cases of fraud. In 1698 the privileges of the English common law were assured to every one. In Delaware no professionally trained judge held office before the Revolution.[29]

Pennsylvania.

The colony of Pennsylvania was fitted out with the most complete system of colonial codes. There was (1) the frame of government, which was unchangeable without the consent of the governor and six-sevenths of the freemen in council and assembly, all freemen at that time being members of the assembly; (2) there were the laws agreed upon in England in 1682, which had the same provisions as to alteration; (3) the Great Law or body of laws enacted at Chester in 1682, containing sixty-one chapters and called the written laws to distinguish them from the foregoing two, called printed laws; (4) the act of settlement passed in Philadelphia in 1683; (5) the laws made at an assembly in Philadelphia in 1683, consisting of 80 chapters; (6) the frame of government of 1683; (7) the frame of government of 1696; and, finally, (8) the laws of October, 1701.[30] These laws are of great interest to the student of legislation, containing the opinions of enlightened and thoughtful statesmen embodied in enactments and gradually modified by

[27] *Grants and Concessions*, p. 404.
[28] Whitehead, *East Jersey under the Proprietors*, p. 239.
[29] Grubb, *Judiciary of Delaware*, p. 9.
[30] See the collection called *The Duke of York's Laws and Pennsylvania Colonial Laws*, which will be cited simply as *The Duke of York's Laws*.

practical experience in colonial affairs. They show clearly how very necessary a complete and full statement and codification of the law that should prevail was held by the founders of Pennsylvania; that they did not rely on an informal transfer of the applicable parts of the common law; but that they, with great painstaking, stated in entirely original form the provisions considered necessary for colonial society.

These laws contain many new and far-reaching reforms. Thus, in the laws agreed upon in England in 1682 there are the following provisions concerning procedure in the courts. Persons may appear in their own way and according to their own manner and personally plead their cause; the complaint shall be filed in court fourteen days before trial; a copy of the complaint is to be delivered to the defendant at his dwelling house; the complaint must be attested by the oath of the plaintiff;[31] all pleadings and processes and reports in court shall be short and in English and in ordinary and plain character, that they may be understood and justice speedily administered.[32] This provision antedates by almost two centuries the celebrated New York code-pleading reform, and this clause very clearly and simply states the object this reform sought to bring about. The period of prescription for the acquisition of title to land is fixed at seven years.[33] The lands and goods of felons shall be liable to make satisfaction to the party wronged.[34] This is a return to an older idea of law, which at that time did not prevail in the English law; for a felony only the king enforced a forfeiture, the injured party could not obtain any satisfaction. In the laws made at Philadelphia in 1683, there is contained a chapter enumerating the fundamental provisions which are to be changed only by the consent of six-sevenths of the council and assembly; this early attempt to separate the fundamental from the secondary provisions of the law is of great interest to

[31] *The Duke of York's Laws*, Laws of 1682, Chap. 6.
[32] Ibid., Chap. 7.
[33] Ibid., Chap. 16.
[34] Ibid., Chap. 24.

students of American constitutional development. The subjects referred to as fundamental are the following: Liberty of conscience, naturalization, election of representatives, taxes, open courts and freedom of pleading, giving evidence, return of inquest and judgment by inquest (jury), bail and liberty of person, registry, marriage, speedy justice, the use of the English language in laws and proceedings.

The proceedings of the earliest courts were quite informal. We have some accounts of trials, before the coming of Penn, under the Duke's laws which provided for a jury of six or seven. The major part of this jury could give in a verdict. An informal statement of the matter at issue was made, and though the names of actions were used, there was no sharp discrimination and not even the distinctions between civil and criminal cases were clearly drawn. The administration of justice was rather founded upon the ideas of the magistrates than on any rules of positive law.[35] Lord Petersboro, during his visit to Pennsylvania, was astonished at the simplicity and fewness of laws, the absence of lawyers and the informality of judicial proceedings.[36]

County courts were instituted in the territory later called Pennsylvania in 1673. The procedure was informal, juries of six or seven were in use.[37] Under the new regime, the jurisdiction of courts was defined by the laws of 1683, Chap. 70, and in 1684, courts were given jurisdiction in equity as well as in law.[38] The same court even reversed in equity its own judgment in law.[39] Against this method the assembly complained.[40] In a number of the courts, the names of English actions were used, but *case* was often substituted for *eject-*

[35] See *Pennsylvania Archives*, vol. VII, pp. 725–730; *The Duke's Laws*, 462; *Memoirs of the Historical Society of Pennsylvania*, vol. VII; Dr. Geo. Smith's *History of Delaware County*.

[36] I Spencer's *Anecdotes*, 155, quoted in *Pennsylvania Bar Association Reports*, I, 229.

[37] *Duke's Laws*, 414.

[38] Ibid., 167.

[39] Hastings vs. Yarrall, *Records Chester County Court*, 1686.

[40] *Votes of the Assembly*, I, 76.

ment.[41] The practice was very much like modern code practice; the complaint was filed fourteen days before trial; ten days before, the defendant had to be summoned, arrested or his goods attached. In court, he might answer in writing; the pleadings were to be in the English language; any defense, legal or equitable, might be interposed.[42] Thus from the first legal and equitable relief was administered by the same courts in Pennsylvania. By the laws of 1683, Chap. 71, an informal body of arbitrators, called peace-makers, was instituted. The appellate court was called the provincial court, but the council also had appellate jurisdiction; and in connection with this it had a jurisdiction, like that of the permanent council of the mediæval English kings and of the Star Chamber, to punish maladministration and malfeasance on the part of powerful officials.[43] As the English Parliament of the time of Edward III, so the Pennsylvania assembly petitioned against this extraordinary jurisdiction. In 1701, it requested that "no person shall be liable to answer any complaint whatsoever relating to property before the governor or his council or in any other place but the ordinary courts of justice."[44]

Pennsylvania at this early period effected the union of equity and law in jurisdiction and in practice, a method that has always characterized the jurisprudence of that state. The voluminous legislation in the case of Pennsylvania may be due to the fact that the charter granted by Charles II. declared that the laws of property and of crimes in the province should be the same as they were in the kingdom of England, until altered by the proprietor. The legislation of Pennsylvania covering virtually the whole field of property law may be called the first complete codification of law made in America.

Penn himself was anxious to secure the services of trained

[41] *Sussex County Records*, 1682, quoted in *Pennsylvania Bar Association Reports*, I, 362.
[42] Laws of 1683, Chap. 66; Laws of 1684, Chap. 167.
[43] *Pennsylvania Colonial Records*, I, 20, 79, 95, 96.
[44] Ibid., II, 37.

lawyers. In a letter to Logan[45] he says that he has granted Roger Mompesson the commission of chief justice and he advises the people to lay hold of such an opportunity as no government in America ever had of procuring the services of an English lawyer. Mompesson, however, did not remain in Pennsylvania long; he went to New York where he became chief justice, being appointed by Cornbury. The first lawyer who became chief justice of Pennsylvania was Guest, in 1701.[46]

The early law of Pennsylvania is very original and contains the germs of many developments that specially characterize American jurisprudence. There was, in this colony, from the first a desire for settled legal relations, which finds expression in a discussion in the colonial council in 1689. When it was there proposed that in doubtful cases the magistrates might apply the colonial laws or the common law at their discretion, this was held too uncertain, and the sole validity of the laws of Penn was upheld.[47] On the question of substituting affirmation for oath, numerous English law precedents were, however, cited by the assembly to the governor.[48] The law of manslaughter is left to be determined by the law of England, in 1705.[49]

Maryland.

By the charter of Maryland, full powers of government were given to the proprietor. He might establish laws, and was not required to submit them for the approval of the Crown. He could establish courts, and process ran in his own name, and he was empowered to grant titles of nobility. He stood in the position of a count palatine.[50] In 1635, the first legislative assembly met, passing a body of laws which was rejected by the proprietor. In 1637, the proprietor and the assembly mutually rejected laws proposed by each other. This caused a

[45] Quoted in Field's *Courts of New Jersey*, 58.
[46] *Penn and Logan Correspondence*, I, 19, 48.
[47] *Pennsylvania Colonial Records*, I, 291.
[48] Ibid., II, 627.
[49] Ibid., 210.
[50] Brown, *Civil Liberty in Maryland, Maryland Historical Society Papers*, 1850.

serious dead-lock, and it seemed impossible to create a code of laws such as had been found necessary in all the other colonies. The colonists, accordingly, in the absence of a code of positive laws claimed that they were governed by the common law of England so far as applicable to their situation. The proprietor opposed this claim on account of the interference with his rights, and the controversy thus arising was not finally settled until 1732.[51]

The rule of judicature was first fixed by the laws of 1642, in which it was ordered that civil causes should be tried according to the law and usage of the province, having regard to the former precedents. In defect of such law, usage, or precedent, the case shall be determined according to equity and good conscience "not neglecting (so far as the judge shall be informed thereof and shall find no inconvenience in the application to this province) the rules by which right and justice useth and ought to be determined in England." The common law of England seems here rather to be looked upon as a system useful for illustration and guidance than a subsidiary law; equity and good conscience was considered to afford proper rules to fill the omissions of the positive law.[52]

The rules for trial were in many respects novel. The judge is allowed to administer an oath to either party in a civil cause, and on the refusal of the party to testify may proceed as if the matter asked had been confessed.[53] The power of the judge in controlling the jury is very great. If he thinks a verdict unjust he may return the jury or charge another. If he find the jury evidently partial or willful, he may charge another jury, and if their verdict is contrary the first jurors may be fined. Among these provisions we also find one of the earliest exemption laws. Tobacco, necessary clothing, bedding, utensils, and tools are exempt from execution.[54]

[51] McMahon's *History of Maryland*, Chap. III.
[52] *Archives of Maryland, Proceedings of General Assembly*, 147.
[53] Ibid., p. 150.
[54] Ibid., p. 152.

The fettered legislative powers of this colony, the unlimited discretion allowed the governor and his council in administration, by the charter, and the somewhat heterogeneous character of the population, led the colonists later more strenuously to insist upon the observance of the principles of the common law as a subsidiary system. Therefore we find that in 1662 an act was passed declaring that when the laws of the province are silent, justice is to be administered according to the laws and statutes of England; and that "all courts shall judge of the right pleading and the inconsistency of the said laws with the good of the province according to the best of their judgment."[55] This act was in force for only a short time, and the rule of judicature was therefore not long established by express law. It is, however, the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions, and to reject provisions deemed unsuitable. The rule stated in the act of 1662 was also contained in the commission of judges, and thus the proprietor seems to have sanctioned this adoption of the common law; the later controversy turned more on the question of the adoption of the statute law of England.

In 1674, an attempt was made to determine by law what English criminal statutes were in force in Maryland. The lower house insisted on the adoption of the whole English statute law, saving all laws of the province not repugnant to the laws of England.[56] The council argued with the lower house, asking them to consider the dangerous consequences of an adoption of the entire English criminal law. They referred to the volume of the English laws and to the difficulty of ascertaining what statutes are at present in force. On account of this uncertainty the lower house is requested to designate certain statutes which are to be re-enacted and thus be a guide to the judges.

In 1678, we find that it is ordered to purchase Keeble's

[55] *Maryland Archives, Proceedings of Assembly*, p. 436.
[56] *Maryland Archives, Assembly Proceedings*, 1666–1676, p. 374.

Abridgment of the English Statutes and Dalton's *Justice* for the use of the various county courts.[57]

The struggle between the proprietor and the people concerning English laws revived in 1722. The people claimed that the lord proprietor had already allowed them the benefit of the common law as their right according to the common opinions of the best lawyers, and that the controversy now was only concerning the applicability of the English statutes.[58] Lord Baltimore resisted the introduction of the English statutes "in a lump," as he expressed it, as doing away with his veto power; while the lower house insisted upon a complete adoption. By the act of 1732 the controversy was settled by the following somewhat equivocal statement that "when the acts and usages of the province are silent the rule of adjudicature is to be according to the laws and statutes and reasonable customs of England, as used and practised within the province."[59] However, the power of the courts to apply any English law, customary or statutory, which they found suitable to American conditions was no longer disputed.

The opposition to lawyers common in the colonies we also find in Maryland.[60] The great influence which the theory of the adoption of the common law gave to the courts was recognized in a resolve of 1684, which stated "that it left too much to discretion and is an open gap to corruption."[61] At this time, however, the lord proprietor insisted that if the English laws were to be used the governor and chief justice must be allowed to decide when they ought to be applied. Only on this basis would he consent to a re-enactment of the judicature act.[62] The attitude of the people toward the proprietor is further illustrated by the fact that an appeal to the king in legal proceedings was asked for.[63]

[57] *Maryland Archives, Proceedings of Assembly*, 1678–83, p. 70.
[58] See citations in McMahon's *History of Maryland*, Ch. III.
[59] McMahon's *History of Maryland*, p. 127.
[60] *Proceedings of Assembly*, II, 168.
[61] *Maryland Archives, Proceedings of Assembly*, 1684–1692, p. 71.
[62] *Maryland Archives, Lower House Journal*, 1676–1702, q. 107.
[63] *Maryland Archives, Proceedings of Council*, II, 140.

Although, even in the earlier practice of Maryland, the terms of English law were used, its principles were often entirely neglected, and matters settled according to a rough equity.[64] Thus, in a case of homicide, the jury brought in a verdict finding accidental killing and no negligence; the court, however, fined the person who had handled the weapon that caused the accident. In another criminal proceeding the accused is arraigned and pleads guilty before the grand jury passes on the indictment and finds it *billa vera*.[65]

[64] *Maryland Archives, Provincial Court.*
[65] Ibid., p. 183.

CHAPTER III.

THE SOUTHERN COLONIES.

Virginia.

The prevailing belief that codes of law are necessary for new colonies is evidenced by Crashaw's sermon preached before the London Company in February, 1609-10. Crashaw says: "Be well advised in making laws, but being made let them be obeyed, and let none stand for scare-crows, for that is the way at last to make all to be contemned."[1]

The instruction for the government of the colonies[2] fixed general rules for the descent of lands, criminal law, jury trials, and placed civil jurisdiction in the hands of the governor and council. The first code intended for the colonies, printed at London in 1612, and entitled Laws Divine, Moral and Martial,[3] was exceedingly severe, and Sir Thomas Smith, the governor, was later much abused for having introduced it into Virginia. On account of the character of the population a strict rule was, however, absolutely necessary. In 1620, an attempt was made by the London company to compile a more adequate and humane code. Sir Edwin Sandys proposed the appointment of several committees for the following purposes: (1) compiling the laws of England suitable for the plantation; (2) collecting the orders and constitutions already in existence; (3) revising the laws passed by the Assembly. These committees were finally to meet and harmonize the entire body of laws which was then to be submitted to the king. Among the commissioners was

[1] Brown, *Genesis of the United States*, p. 371.
[2] Ibid., pp. 368–71.
[3] Ibid., p. 528.

John Selden.[4] These committees, however, did not report and Governor Yeardley asked for authority to make a collection of suitable laws.[5]

The first legislative assembly of Virginia met in 1619. It passed a number of laws and petitioned the council that they would "not take it in ill part if these laws passed current and be of force until we know their further pleasure out of England, for otherwise this people would in a short time grow too insolent." There is here so far no claim of the immediate validity of English laws in the colony, and all parties concerned seem to think the formation of a new code adapted to the circumstances of the settlers necessary. In 1631, the oath of commissioner of monthly courts was fixed as follows: "You shall do equal right to poor and to rich after your cunning, wit and power and after the laws and customs of this colony, and as near as may be after the laws of the realm of England."[6] There was not in Virginia, as we have noted in many of the other colonies, a system of courts whose magistrates were elected by the people. The county courts were presided over by eight or ten gentlemen receiving their commission from the governor. Notwithstanding the source of their appointment, these men, not being educated in the law, would perhaps not be governed by considerations much different from those obtaining in the popular courts of Massachusetts and Connecticut. The large number of the members of the court is of itself a reversion to the very archaic type of Doomsmen of the Anglo-Saxon courts, who there declared the custom and fixed the mode of trial. Appeal lay from these courts to the general court, composed of governor and council. Their jurisdiction grew up by custom and the forms of proceedings were quite irregular. They also exercised a general chancery jurisdiction.[7]

[4] Proceedings of the Virginia Company of London. *Virginia Historical Collections*, vol. VII, p. 55.
[5] Ibid., p. 55.
[6] Hening, *Statutes at Large*, vol. I, p. 169.
[7] Campbell, *History of Virginia*, p. 352.

By the statutes of 1661–1662 procedure in the courts was regulated. At the time of the Restoration Virginia seems to have been especially anxious to show herself loyal to England, and these enactments breathe a deep respect for the common law. In the preamble it is stated that the legislature has endeavored in all things to adhere to these "excellent and refined laws of England to which we profess to acknowledge all due obedience and reverence." As a reason for enacting laws at all they assign the vast volume of the English law from which courts would be unable to collect the necessary principles without the aid of such codification.[8] The former laws are repealed and a new code is enacted. As some former laws restrained the trial by jury quite contrary to the laws of England, the law of juries is restated with special carefulness and precision. It is interesting to note in this connection that the colonists express their regret that they are unable to comply with the requirement of the English jury system that the jurors shall come from the immediate neighborhood of the place where the fact was committed; but they state that they desire to approach as near as possible to compliance by enacting that six men of the ablest and nearest of the inhabitants of the county shall be on the jury.[9] This reminds us of Sir John Fortescue's contention that France could not have the jury system, because there no neighborhood could produce twelve intelligent and substantial jurors. In this code the period of prescription for land is limited to five years.[10]

The system of itinerant judges existed in Virginia for some time, but was abolished in 1662 on account of the great charge to the country.[11] The nature of the procedure in the county courts is seen from the provision that the bill or complaint must be filed the day before court, that the answer and judgment as well as evidence in the case is also to be filed, that the judg-

[8] Hening, *Statutes at Large*, vol. II, 43.
[9] Ibid., II, 63.
[10] Ibid., 97.
[11] Ibid., II, 179.

ment is to be endorsed on the complaint if for the plaintiff, on the answer if for the defendant.[12]

The administration of law in Virginia was in the hands of the country gentlemen who looked down upon the legal profession, and in no state do we find more hostile legislation concerning lawyers than in the Old Dominion. In 1645 an act was passed expelling the mercenary attorneys.[13] In November, 1647, it is enacted that none shall plead for recompense, That in case the courts shall perceive that "either party by his weakness shall be like to lose his cause, they themselves may open the cause or may appoint some fit man out of the people to plead the cause, but shall not allow any other attorneys." In 1656 the hostile acts were repealed, but only a year later there was again proposed in the house "a regulation or total ejection of lawyers," whereupon the decision was "by the first vote an ejection."[14] A new act was therefore passed[15] forbidding any person to plead or give advice in any case for reward. The governor and council rather opposed this enactment, but promised to consent to the proposition "so far as it shall be agreeable to Magna Charta." A committee was appointed, who upon considering Magna Charta, reported that they did not discover any prohibition contained therein.[16] In 1728, in a paper on the state of the colonies in America, Keith gives a very unfavorable account of the administration of law in Virginia. In order to unify and settle the law he favors the appointment of circuit judges from England.[17] Governor Gooch, in his answer to Keith's criticisms, says that the practice of courts is exactly suited to the circumstances of the respective governments and as near as possibly can be conformable to the laws and customs of England, and that the judges are of com-

[12] Hening, II, 71.
[13] Hening, I, 482.
[14] Hening, I, 495.
[15] Ibid., p. 482.
[16] Neill's *Virginia Carolorum*, p. 264.
[17] Byrd Manuscripts, 1728, p. 222.

petent knowledge in the laws, though not all of them profound lawyers.[18]

The Carolinas.

In the case of the Carolina colonies the enforcement of a very complete code, the celebrated Fundamental Constitutions, was attempted by the proprietors. These Constitutions were reactionary in the extreme, and attempted to introduce an intricate feudal system into the new colony. The redeeming feature of the act lies in its very liberal provisions concerning religious affairs, giving any body of believers the right to worship according to the dictates of their conscience. It is very doubtful if aside from these provisions concerning religion the Fundamental Constitutions had any permanent influence in molding the jurisprudence of the Carolinas. They were first promulgated in 1668, and were reissued in modified forms repeatedly until their final abandonment in 1698. The purpose of this code was to "establish the interest of the proprietor with equality and without confusion that the erecting of a numerous democracy may be avoided."[19]

We have no satisfactory information about the actual administration of justice in the early days of Carolina. The different colonies in the Carolinas had originally, however, very little in common, being settled by various elements. And it is highly probable that each of these colonies developed at first its own customary and popular methods of dealing with legal controversies.[20] The Carolinas were among the earliest colonies to adopt the English common law as a rule of adjudicature. This was done in South Carolina by the act of December, 1712.[21]

Before, in 1692, the assembly in an address to Governor Ludwell had complained, because "the Palatine Court assumed to

[18] Ibid., p. 237.

[19] Fox Bourne, *John Locke*, p. 238; and Hawks, *History of North Carolina*, p. 182.

[20] Chalmer's *Political Annals*, p. 521.

[21] See Robt. Mills, *Statistics of South Carolina*, p. 196.

put in force such English laws as they deemed adapted to the province; but the assembly conceived that either such laws were valid of their own force, or could only be made so by an act of assembly."[22] The proprietors assumed that all laws of England applied to the colonies, but in 1712 they receded from their position by approving the act adopting the common law and such statutes of England as had been selected by Chief Justice Trott as applicable to the condition of the colony.[23] The act of 1712 puts in force all English statutes declaring the rights and liberties of subjects, as well as the common law, except where it may be found inconsistent with the customs and laws of the province. The law concerning military tenures and ecclesiastical matters is especially excepted. The courts are here, as in Maryland, given the power to apply the principles of the common law. In North Carolina the same object was accomplished by the act of 1715, entitled "An act for the better observing of the queen's peace," which declares the colony to be "a member of the crown of England," and provides that the common law shall be in force in this government "so far as shall be compatible with our way of living and trade." The practice of issuing writs is specially excepted. Certain enumerated statutes, such as the statute confirming the privileges of the people and security of trade, the statute of limitations, and the statute of frauds, are also adopted by this act.

From the scanty records of the early days of the colonies we can glean that the proceedings were often very informal. The discretion of the magistrates in inflicting punishment was very wide, as is apparent from the cases cited by Hawks in his history.[24]

A court of chancery was established as early as 1697, in which the English chancery practice is in the main adhered to.[25] At a very early date trained lawyers were in these colonies among

[22] Rivers, *Historical Sketch of South Carolina*, p. 433.
[23] *Statutes of South Carolina*, II, 401.
[24] Hawks, *History of North Carolina*, II, 122, 218.
[25] Ibid., p. 134.

the judges; in the year 1729 we find that on the question of the effect of a general pardon an English case[26] is cited and followed in the adjudication, one of the earliest instances where such a use of English authorities can be ascertained.

In South Carolina, the city of Charleston was for almost a hundred years the seat of the colonial court, the source and center of judicial proceedings. This of course was favorable to an earlier reception of the English common law, as a centralized system of judicial administration always leads to a more highly developed form of juristic conceptions. On the other hand this concentration of jurisdiction had the effect of leaving large tracts of the colony virtually without regular administration of the law, so that in the remoter parts of South Carolina associations of regulators had to be formed to deal out a rough popular justice.[27]

Anthony Stokes, Chief Justice of Georgia, in his *View of the Constitution of the British colonies of North America and the West Indies,* London, 1783, gives a very interesting discussion of the state of legal administration in the southern colonies. He states that the colonies where the system of county courts prevailed, where there were a large number of judges in general unacquainted with the law, little decorum was observed in the courts; but the colonies where the judges of the superior court went on circuit had a more impartial administration of justice. A system of circuit courts, however, was not established in the colonies in the 17th century, except for a short time in Virginia. And the lack of a harmonious, unified, and consistent rule of adjudication may be inferred from the one fact of the absence of a unified judiciary. Of course a system of appeal would tend to unify the law, but in these early days an appeal to a central court was by no means an easy matter, and, in the ordinary administration of justice the citizens undoubtedly took their law from the popularly elected

[26] 2 Croke, 148.
[27] Ramsay's *History of South Carolina,* p. 120.

magistrates who had no pretensions to a knowledge of technical jurisprudence.

Stokes also discusses the question as to what part of the English common law the colonists had brought along with them.[28] His answer illustrates the vagueness and the unhistorical character of the legal theory. He says that the general rules of inheritance and personal injuries were brought along; not, however, the artificial distinctions and refinements of property law, the laws of police and revenue, etc. Now we have seen that the law of personal injuries was usually fixed by the codes which the colonists established at an early date, the rule of inheritance too was in most colonies varied from that of the common law; and certainly an adoption of any system which would leave out property law could be styled an adoption only in a very modified sense of the term.

[28] Stokes, *View of the Constitution of the British Colonies*, pp. 9, 10.

CHAPTER IV.

CONCLUSION.

When we come to consider from a more general point of view the attitude of the early settlers toward the common law, we find that certain views of law pervaded all the colonies; that in other matters the various colonies followed their own bent and were influenced by their special conditions or the special purposes of their polities. A general trait of early colonial law is codification. It seems to have been universally considered necessary to state the essential elements of law for the guidance of the colonists who had taken up their abode in a wilderness without books or facilities for legal study, who therefore in the nature of things could not use a system which, like the common law even of that date, necessitated a vast apparatus of technical treatises, of reports, and of statute books. In all the colonies except Maryland we find an early codification of the essential elements of the law. In Maryland, as we have seen, this was prevented by the controversy between the people and the proprietor, but even there considerable legislation was produced at an early date. Some of the codes, like those of Massachusetts and Pennsylvania, departed in many essentials radically from the principles of the common law, and show that their framers consciously desired to meet the entirely novel conditions of the colonists by new and appropriate legal measures. We may safely say that these codes were in the first decades of the colonies almost the sole source of legal knowledge, of rules for adjudication. As to matters not covered by the law here stated, the good and careful discretion of the popularly elected magistrates or appointed judges was relied upon to furnish a just rule satisfactory to the popular sense of right. In some in-

stances we have noticed the use of elementary English treatises on actions, like Dalton's *Justice,* but we have also noticed that while the names of the forms of actions were used, the greatest laxity and informality prevailed in their application and in the general practice of the popular courts.

Some of the colonies declared the English common law subsidiary in cases not governed by colonial legislation at a comparatively early date. We have noted this in the case of Maryland, Virginia and the Carolinas. But other colonies very early made unequivocal declarations of looking upon the law contained in Scripture as subsidiary law in their system. This is true of Massachusetts, Connecticut, and New Haven and to a certain extent of New Jersey. In both cases, however, in the earlier days before a trained bench and bar had come into existence, a declaration of the existence of a subsidiary law would but little bind the otherwise unfettered discretion of the popular judges; because undoubtedly these judges (like the Chancellor in Marks vs. Morris, 4 Hening and Mumford, 463) would epitomize the common law in the ancient rule of *"honeste vivere"* and thus apply their own ideas of justice until called to account by a trained bar, which arose later, during the 18th century.

The records that have been examined exhibit everywhere, especially in the popular courts, a great informality in judicial proceedings. The large number of judges in these courts would of itself tend to make the practice informal, to make the trial more like a deliberation of a community by its representatives on the justice or injustice of the case involved. The absence of a jurist class, and especially the universal prejudice against lawyers, proves that a popular and not a technical system was being enforced. The technical knowledge of the lawyer was not demanded, and, like Lechford, the lawyers had to turn their hands to semi-professional or non-professional work, the courts of the colonies at that date having no need of the aid of a trained profession to discover what was the law, as by the custom of the time the law was in so many cases determined by the dis-

cretion of the court. It seems just to conclude that in most cases the administration of law was carried on not according to the technical rules of a developed system of jurisprudence but by a popular tribunal according to the general popular sense of right.

The original elements in the early colonial laws are great in number and import. They foreshadow and anticipate some of the most far-reaching American law reforms. Pleading is simplified, and the intention is in many places expressed that it shall be possible for any man of ordinary intelligence to plead his own cause before the courts. This innovation supports the same conclusions that we have reached from the facts of the institution of popular courts and the absence of trained jurists. Evidence was in many colonies given in writing, or at least taken down by the clerk and made a part of the record in the action; a practice utterly abhorrent to common law ideas, not so to the popular mind to whom the evidence is the most important part of the case. Various modifications of the jury system have been noted, but in general this venerable and highly popular institution was finally adopted in the colonies in its English form at an early date. The period of prescription was in many of the colonies lowered to five or seven years, a change that was of course eminently consistent with the conditions of an infant colony on a new continent. Executions on land were permitted, and in many cases the fundamental distinction between real and personal property in the English law was obliterated or ignored. The laws of inheritance and of tenure were, as we have seen, very materially modified, very often leading to the adoption of a system totally unlike the common law at that period.

The historian will be interested in the reversion to the more ancient customs of the common law which we have ascertained in a number of cases. Such are the bestowal of judicial functions in law and in equity on the councils, protests against the extraordinary jurisdiction of which recall the history of the

jurisdiction of the Great Council and Chancellor in England in the 13th and 14th centuries. We have seen how archaic ideas of the jury were revived; Georgia, even after the period of independence, using a system of controlling the jury that was modelled on the old method of attaint. We have also seen how the idea of tort liability for crimes was revived, an idea that has been in the last decades again enforced with new emphasis by our legislatures. But the most important and interesting revival of older institutions is found in the popular courts composed of a comparatively large number of judges, recalling the twelve thanes of early English law, who declared law and custom in a simple, straightforward manner. Men here appear to plead their own causes, unassisted save by the unremunerated help of a friend or by the court itself. The court is not a trained judge, drawing his knowledge from, and supporting his judgment upon the accumulated wisdom of ages of legal development, but a popular committee representative of the people and enforcing the general popular custom and sense of justice.

We have also noted the prevailing views on the nature of law. The analytical theory of Hobbes, making positive law independent of moral considerations and basing it on a sovereign will, was not accepted at that time. The law of God, the law of nature, was looked upon as the true law, and all temporal legislation was considered to be binding only in so far as it was an expression of this natural law. With such a view of the nature of legal obligations, it does not seem strange that the magistrates should look for the true law in their own sense of right and justice, or, in the Puritan colonies, in the word of God.

The views of the common law when expressed are of the most rudimentary and incomplete kind. Ignorance of the system is often most frankly confessed, and when a comparison is instituted between the colonial laws and the common law, Magna Charta is taken as a sufficient embodiment and expression of the lat[illegible]. This is true not only in the Puritan colony of Massa-

chusetts, but also in Virginia where, when it was to be decided whether an act was contrary to the common law, the committee thought it sufficient to examine Magna Charta.

Among the early colonists we therefore find a very clear perception of their destiny to work out a new legal system, to establish rules dictated by their special polity or by the conditions of primitive and simple life in which they found themselves. Respect is often expressed for the common law, the resolution is in some cases even formed of using it as a model, but it is only in a few cases clearly established as the rule of judicature and in still fewer instances followed with precision in the ordinary administration of the law. A restatement of the law for the use of courts and people, in the form of brief codes, is everywhere considered necessary. These codes cover the more essential parts of the law, leaving cases therein not anticipated to be decided by the discretion of the magistrates. The theory of the transfer of the common law as subsidiary law at the beginning of the colonies is therefore, in its unmodified form, not a true statement of colonial legal relations. We cannot understand the history of our law, nor justly value the characteristic development of our jurisprudence, unless we note the actual attitude of the earliest colonists towards the common law, an attitude sometimes of apathy, of lack of understanding, sometimes of resistance or ignorement, sometimes, as in the case of Maryland, of admiration and adherence from the first.

It has been said that the colonists imported the general principles, the general system of reasoning of the common law. This is either self-evident or too indefinite to be of any historical value. It is certainly true that ideas of right and positive law develop side by side mutually influencing and reacting upon each other; and in this sense the English colonists, in their general ideas of justice and right, brought with them the fruits of the "struggle for law" in England. But when the expounders of the theory attempt to descend to particular statements of these general principles, they use colorless phrases that might

as well be applied to any other system of civilized jurisprudence as to the common law. And when we apply the theory to the facts, we find that it is not a true and complete statement of the basis of jural relations in the early colonies.

Most of the colonies made their earliest appeals to the common law in its character of a muniment of English liberty, that is considering more its public than its private law elements. In the 18th century, with a more jealous supervision of colonial development by the mother country, the introduction of law books, and the growth of a trained bench and bar, a more general reception of the private law principles of England is brought about.

Careful study of the early peculiarities of our system is necessary for an understanding of the juristic history of our various commonwealths and of the nation as a whole; a knowledge of the facts revealed by the documents will enable us to see the true nature of the adoption of the common law of England as a subsidiary system. It will permit us to recognize from the first in our history an originality of legal development which the accepted juristic theory tends to obscure.

To state the final conclusion arrived at: The process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles. This is but natural; the common law was a technical system adapted to a settled community; it took the colonies some time to reach the stage of social organization which the common law expressed; then gradually more and more of its technical rules were received.

The object of this thesis has been to show the points of departure; it remains to trace the history of the gradual adoption

of the common law in practice and its amalgamation with the original elements of American colonial law. American jurisprudence has three sources: (1) original institutions and legal ideas developed by the colonists in response to the demands of their novel situation; (2) principles and institutions derived from and modelled upon Scriptural authority, (3) the principles of the older English law; the former are not sufficiently emphasized by the accepted legal theory. From the first our law had a large element of originality and gave evidence of creative power.

BIBLIOGRAPHY OF SOURCES AND AUTHORITIES.

GENERAL.

CHALMERS, GEORGE. Political Annals of the Present United Colonies. London, 1780.

FORCE, PETER. Tracts and other Papers. Washington, 1844.

POORE, BEN: PERLEY. Federal and State Constitutions, Charters and Documents, and other Organic Laws of the United States. Washington, 1877.

POWNALL, THOMAS. The Administration of the Colonies. London, 1768.

NEW ENGLAND.

ARNOLD, SAMUEL GREENE. History of Rhode Island. Providence, 1894.

BALDWIN, S. E. Three Constitutions of Connecticut. New Haven Hist. Soc. Papers, V, 180.

BELKNAP, JEREMY. History of New Hampshire. Dover, 1831.

BELL, CHARLES H. Bench and Bar of New Hampshire. Boston, 1894.

BRONSON. Early Government in Connecticut. New Haven Historical Society Papers, III, 291.

CHALMERS, GEORGE. Opinions of eminent Lawyers on various Points of English Jurisprudence chiefly concerning the Colonies. London, 1858.

CHIPMAN, DANIEL. Reports (Vermont).

Collections of the Connecticut Historical Society, Vol. I. Hartford, 1860.

Colonial Laws of Massachusetts. Edition of 1660 (Reprint of 1889).

Connecticut Colonial Records.

DAVIS, ANDREW M. Corporations in the Days of the Colony. In Publication of Colonial Society of Massachusetts, I, 196. Boston, 1895.

Edward Randolph. Prince Society Publications. Boston, 1898.

GRAY, F. C. Remarks on the early Laws of Massachusetts Bay. Massachusetts Historical Collections, Third Series, VIII, 191.

HOLLISTER, G. H. History of Connecticut. New Haven, 1855.

HUBBARD'S History. Massachusetts Historical Collections: Second Series, VII, 320.

Hutchinson Papers. Prince Society Publications. Albany, 1865.

LECHFORD, THOMAS. Plaine Dealing, or News from New England. Trumbull's Edition. Boston, 1867.

Note Book, 1638–1641. In Trans. of the American Antiquarian Society, Vol. VII. Cambridge, 1885.

LEWIS AND NEWHALL. History of Lynn. Boston, 1865.

Massachusetts Historical Society Collections.

New Haven Colonial Records.

QUINCY, (Massachusetts) Reports.

PALFREY, JOHN GORHAM. History of New England. Boston, 1858–1890.

Records of Massachusetts Bay. Boston, 1854.

Records of New Plymouth. Boston, 1855–60.

Rhode Island Colonial Records.

Suffolk Deeds. Boston, 1880–1897.

TRUMBULL, JOHN HAMMOND (ED.). The True Blue Laws of Connecticut and New Haven. Hartford, 1876.

WASHBURNE, EMORY. Sketches of the Judicial History of Massachusetts. Boston, 1840.

WHITE, H. Civil Government in the New Haven Colony. New Haven Historical Society Papers, I, 1.

WINTHROP, JOHN. History of New England from 1630 to 1649. Boston, 1853.

NEW YORK.

Documents Relative to the Colonial History of New York.

FERNOW, BERTHOLD. Calendar of Wills, 1626–1836. New York, 1896.

The Records of New Amsterdam. New York, 1897.

New York Historical Society Collections.

SMITH, WILLIAM. History of New York. Albany, 1814.

The Duke of York's Laws. Charters and Laws of Pennsylvania. (Published at Harrisburg, Pa., 1879.)

DELAWARE AND NEW JERSEY.

FIELD, RICHARD S. Provincial Courts of New Jersey. New York, 1849.

Grants and Concessions of New Jersey.

GRUBB, IGNATIUS C. The Colonial and State Judiciary of Delaware.

Delaware Historical Society Papers, Vol. II.

SMITH, SAMUEL. History of the Colony of New Jersey. Burlington, 1765.

THOMAS, GABRIEL. Historical and Geographical Account of Pennsylvania and West Jersey. London, 1698.

PENNSYLVANIA.

ADDISON, ALEXANDER. Charges to Grand Juries in Pennsylvania, 1791–1798. Washington, Pa., 1799.

BALCH, THOMAS. Letters and Papers relating to the Provincial History of Pennsylvania. Philadelphia, 1855.

DALLAS (Pennsylvania) Reports.

[FRANKLIN, BENJAMIN ?] An Historical Review of the Constitution and Government of Pennsylvania. London, 1759.

LAUSSAT, ANTHONY. Equity in Pennsylvania. 1825. Pennsylvania Bar Association Report, Vol. I.

Laws of Pennsylvania. Edition of 1810.

LEWIS, LAWRENCE. Courts of Pennsylvania in the 17th Century. Pennsylvania Bar Association Report, Vol. I.

Penn and Logan Correspondence. Memoirs of the Historical Society of Pennsylvania, Vols. IX and X. Philadelphia, 1870.

Pennsylvania Archives.

Pennsylvania Colonial Records.

SHARSWORD, GEORGE. The Common Law of Pennsylvania. Pennsylvania Bar Association Report, Vol. I.

SMITH, GEO. History of Delaware County. Philadelphia, 1862.

MARYLAND.

BROWN. Civil Liberty in Maryland. Maryland Historical Society Papers, 1850.

Calvert Papers. Maryland Historical Society Publications. Baltimore, 1889.

GAMBRALL, TH. C. Studies in the Civil, Social, and Ecclesiastical History of Early Maryland. New York, 1893.

KILTY, JOHN. Landholders Assistant. Baltimore, 1808.

MCMAHON, JOHN VAN LAER. Historical View of the Government of Maryland. Baltimore, 1831.

Maryland Archæological Society Proceedings.

Maryland Archives, Proceedings and Acts of the General Assembly.

—— Proceedings of the Council.

SPARKS, F. E. Causes of the Maryland Revolution of 1689. (Johns Hopkins University Studies.) Baltimore, 1896.

VIRGINIA.

BROWN, ALEXANDER. The First Republic in America. Boston, 1898.

——The Genesis of the United States. Boston, 1890.

BYRD, WILLIAM. History of the Dividing Line and other Tracts. Richmond, 1866.

Calendar of Virginia State Papers.

CAMPBELL, CHARLES. History of the Colony and Ancient Dominion of Virginia. Philadelphia, 1860.

HOWISON, R. R. History of Virginia. Philadelphia, 1846.

HENING. Statutes at Large of Virginia.

JEFFERSON, THOMAS. Complete Works. Washington, 1853–1854.

JONES, HUGH. The Present State of Virginia (1724). New York, 1865.

NEILL EDWARD D. Virginia Carolorum. Albany, 1886.

Virginia Historical Collections.

THE CAROLINAS.

BOURNE, H. R. FOX. The Life of John Locke. London, 1876.

Collections of the Historical Society of South Carolina.

HAWKS, F. L. History of North Carolina. Fayetteville, 1859.

MCGRADY, EDWARD. The History of South Carolina under the Proprietary Government. New York, 1897.

MILLS, ROBERT. Statistics of South Carolina. Charleston, 1826.

RAMSAY, DAVID. History of South Carolina. Charleston, 1808.

RIVERS, WILLIAM JAMES. A Sketch of the History of South Carolina. Charleston, 1856.

STOKES, ANTHONY. View of the Constitution of the British Colonies in North America and the West Indies. London, 1783.

3 2044 011 290 772

THE BORROWER WILL BE CHARGED AN OVERDUE FEE IF THIS BOOK IS NOT RETURNED TO THE LIBRARY ON OR BEFORE THE LAST DATE STAMPED BELOW. NON-RECEIPT OF OVERDUE NOTICES DOES NOT EXEMPT THE BORROWER FROM OVERDUE FEES.

WIDENER

WIDENER

MAY 02 2001

MAY 09 2001

CANCELLED